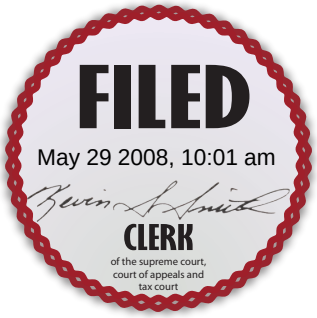

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IN THE COURT OF APPEALS OF INDIANA

JAMES A. GATES IV, Appellant,	)	
vs.	)	No. 26A01-0712-CV-600
KELLY WILDER GATES, Appellee.	)	

APPEAL FROM THE GIBSON CIRCUIT COURT
The Honorable Jeffrey F. Meade, Judge
Cause No. 26C01-0702-DR-9

May 29, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant James A. Gates IV ("Father") appeals from the trial court's December 23, 2007 order regarding his ability to exercise his parenting time over the 2007 Christmas holiday and his child support obligation. On appeal, Father contends that the trial court abused its discretion in modifying the Mediated Settlement Agreement ("divorce agreement"), failing to enforce the agreement, finding that Father was voluntarily unemployed or underemployed, and imputing $50,000 annual income to Father for the purpose of figuring his child support obligation. Concluding that the trial court did not abuse its discretion in any regard, we affirm.

FACTS AND PROCEDURAL HISTORY

Father and Kelly Wilder Gates ("Mother") were married on October 10, 1998. During the course of their marriage, Mother and Father had three children, J.G., born in September of 2000; C.G., born in September of 2002; and A.G. born in May of 2005 (collectively, "the children").[1] Mother and Father were divorced on September 10, 2007. Pursuant to their divorce agreement, Mother and Father shared legal custody of the children, Mother retained physical custody of the children, Father was entitled to parenting time with the children, and Father's child support obligation was set at $336.00 per week.

On October 4, 2007, Father notified the trial court that he had relocated to Houston, Texas. On November 2, 2007, Father requested that the trial court modify his child support obligation because he had allegedly been unable to obtain satisfactory

[1] At the time this appeal was filed, J.G., C.G., and A.G., were seven, five, and two years old.

employment. Father additionally requested that Mother be found in contempt of the divorce agreement with respect to his parenting time with the children. Father claimed that Mother had refused to allow the children to travel to Houston to stay with Father and his new fiancée and her four- and seventeen-year-old sons, none of whom Mother had ever met, during the upcoming Christmas holiday.

On December 3, 2007, the trial court conducted a hearing on Father's motion. Mother attended the hearing and was represented by an attorney. Father did not attend the hearing but was represented by an attorney. With respect to Father's request for a modification of his child support obligation, the trial court found that Father was voluntarily unemployed or underemployed and imputed to him an annual income of $50,000 for purposes of calculating his child support obligation. With respect to Father's parenting time, the trial court noted that Father had a right to see his children, but found that:

> [I]t would not be in the best interest of the Children to travel to Texas over this Christmas holiday, even if accompanied by the Father. The Children need to spend quality one-on-one time with the Father without the intervention or presence of a girlfriend, fiancé[e], or her children. The Court believes that to allow the Father to take the Children out of state would have a negative psychological and personal impact on them. Therefore, the Father may have parenting time with the Children over Christmas pursuant to the Indiana Parenting Time Guidelines, so long as it is exercised in the Gibson County, Indiana geographic area personally by the Father, and without his girlfriend or fiancé[e] present.[2]

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[2] The trial court specifically noted that its ruling only pertained to the 2007 Christmas holiday and the immediate time thereafter and did not address Father's rights to future overnight visits with the children because the majority of the evidence presented pertained to Father's visitation during the Christmas holiday. The trial court further noted that the parties should attempt to come to an agreement regarding future overnight visits, how and when visits with Father's fiancée and her sons should be phased in, and to begin working toward such visits.

Appellant's App. p. 7. Father now appeals.

DISCUSSION AND DECISION

I. Parenting Time

Indiana has long recognized that the right of parents to visit their children is a precious privilege that should be enjoyed by non-custodial parents. *Malicoat v. Wolf*, 792 N.E.2d 89, 94 (Ind. Ct. App. 2003). However, the parent's right of visitation is subordinate to the best interests of the children. *Stewart v. Stewart*, 521 N.E.2d 956, 960 (Ind. Ct. App. 1988), *trans. denied*. Therefore, in all parenting time controversies, courts are required to give foremost consideration to the best interests of the children. *In re Paternity of G.R.B.*, 829 N.E.2d 114, 122 (Ind. Ct. App. 2005). When reviewing the trial court's resolution of a parenting time issue, we reverse only when the trial court has manifestly abused its discretion. *Id*. If the record reveals any rational basis for the trial court's determination, no abuse of discretion will be found. *See id*. We will not reweigh the evidence or judge the credibility of the witnesses. *Id*.

A. Modification of Agreed Parenting Time Arrangement

Father claims that the trial court abused its discretion because the December 3, 2007 Order improperly modified the parties' visitation agreement as provided in their divorce agreement. With regard to parenting time, the divorce agreement provided that:

> The Indiana Parenting Time Guidelines shall apply. Each party has been provided a copy of the Parenting Time Guidelines. If the Husband moves out of the region, then the "when distance is a major factor" sections shall apply and the parties shall [] share the cost of transportation. However, the Wife's portion shall not exceed Two Hundred Fifty Dollars ($250.00) annually. While the children are still young, the parties shall make a good

> faith attempt to come to an agreement about how long the Husband's extended out of town parenting time should be.

Appellant's App. p. 21.

As the name suggests, the Indiana Parenting Time Guidelines are not immutable, black letter law, but rather are guidelines that aim to assist divorced parties in developing an agreed parenting time arrangement for the non-custodial parent. *See generally, McGill v. McGill*, 801 N.E.2d 1249, 1251 (Ind. Ct. App. 2004). The Guidelines are "designed to assist parents and courts in the development of plans and represent the minimum time a parent should have to maintain frequent, meaningful, and continuing contact with a child." Ind. Parenting Time Guidelines, Preamble. The Guidelines do not consider specific visitation arrangements, but rather suggest that parents should be flexible and should work to create a parenting time agreement which addresses the unique needs of the children and their circumstances. Ind. Parent. Time G., Preamble.

Here, neither party disputes that distance is a major factor.[3] Therefore, the section of the Parenting Time Guidelines contemplating parenting time when "Distance is a Major Factor" undeniably apply.[4] *See* Ind. Parent. Time G. §3. The Guidelines provide that when distance is a major factor, the "parents shall make every effort to establish a reasonable parenting time schedule." Ind. Parent. Time G. §3(2). The Guidelines do not

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[3] Father resides in Houston, Texas, and Mother and the children reside in Oakland City, Indiana. The driving distance between Houston, Texas and Oakland City, Indiana is approximately 900 miles.

[4] To the extent that Father contends that Section II (Specific Parenting Time Provisions) and Section III (Parenting Time When Distance is a Major Factor) are not exclusive of each other and that both should be applied, we conclude that the trial court's decision to apply only Section III of the guidelines was within its discretion.

specify when and where such parenting time should take place, but do recognize that certain restrictions may be appropriate for children under the ages of three or four.

At the conclusion of a hearing on Father's contempt motion, the trial court found that Father's request for a weeklong visit from the children at his home in Houston over the Christmas holiday was unreasonable and opined that Father was asking "for a little too much too soon." Appellant's App. p. 8. The trial court issued an order limiting the geographical area in which Father could exercise his parenting time over the Christmas holiday to southwestern Indiana, finding that it was not in the best interests of the children to travel to Father's home in Houston at that time. While the trial court's order did limit the geographical area in which he could exercise his parenting time, the order did not deny Father the opportunity to exercise his parenting time altogether.

Here, the trial court considered many circumstances in making its determination that it was not in the children's best interest to visit Father's home in Houston over the Christmas holiday. Father relocated to Houston in early October and, as of the date of the hearing, had not had any physical contact with his children since before relocating. Father was cohabiting with his new fiancée and her four- and seventeen-year-old sons, none of whom the children had ever met. The children had never been away from Mother for more than a few days. Weeklong visits with the non-custodial parent are generally not recommended by the Parenting Time Guidelines for children under the age of three, and A.G. was only two years old at the time in question.

Further, the trial court recognized that the Parenting Time Guidelines provide that, under some circumstances, it may be appropriate for a non-custodial parent to exercise

parenting time in a location near the children's residence and that it may be in the best interests of the children to "phase-in" visits with the non-custodial parent and any new adults in the either parent's life who might have a substantial impact on the children. In light of this recognition, the trial court found that lengthy overnight visits between Father and the children should be phased in, as should contact between the children and Father's new fiancée and her sons. Upon review of the trial court's determination, the Parenting Time Guidelines, and the parties' divorce agreement, we conclude that the trial court did not modify the section of the parties' divorce agreement pertaining to Father's parenting time, but merely emphasized that due to Father's relocation, the "When Distance is a Major Factor" section of the Parenting Time Guidelines should apply. Here, the trial court found that Father's requested parenting time in Houston was unreasonable under the circumstances because it would not be in the children's best interests and that the parties should work together to develop a parenting time schedule that would comply with the Parenting Time Guidelines, and, most importantly, would advance the children's best interests. We agree with the trial court's findings and thus conclude that the trial court did not abuse its discretion in this regard. In that we have affirmed the trial courts findings on their merits, we need not address Mother's argument that these issues are moot.

B. Failure to Enforce Agreement

Father next contends that the trial court abused its discretion by failing to enforce the portion of the parties' divorce agreement pertaining to his parenting time with the parties' three children. However, we find this contention to be unpersuasive in light of

the fact that the trial court specifically provided a reasonable avenue by which Father could exercise his parenting time over the Christmas holiday. We therefore conclude that the trial court did not fail to enforce the parties' agreed parenting time arrangement and note that if Father failed to exercise his parenting time with his children over the Christmas holiday, such failure was his own and was not attributable to the trial court. As such, the trial court did not abuse its discretion in this regard.

II. Child Support Obligation

Father next contends that the trial court abused its discretion in determining that he was voluntarily unemployed or underemployed and in imputing annual income of $50,000 to him for the purpose of calculating his child support obligation. A trial court's calculation of a child support obligation under the child support guidelines is presumptively valid. *Kondamuri v. Kondamuri*, 852 N.E.2d 939, 949 (Ind. Ct. App. 2006). Thus, we will reverse only if the trial court abused its discretion, which, again, occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or if the court has misinterpreted the law. *Id*. Furthermore, the trial court has wide discretion to impute income in child custody matters to ensure that a parent does not evade his or her support obligation. *Thompson v. Thompson*, 868 N.E.2d 862, 869 (Ind. Ct. App. 2007). A trial court may impute income to a parent when it finds, among other things, that the parent is voluntarily unemployed or underemployed. *Id*.

Here, the trial court found that Father was voluntarily unemployed or underemployed and that a fair income for Father, based on his earnings history, his annual investment income of at least $13,000, and his potential employment, to be

$50,000. The record establishes that Father had submitted approximately ten on-line applications to ConocoPhillips and that he had searched for work on the website hotjobs.com.[5] Father's counsel claimed that Father, who did not appear at the hearing in person, was only considering jobs that at least equaled the annual compensation he received at his former employment. Father provided no explanation for his inability to secure a lower paying job in the meantime. The record also established that Father had decided to obtain his Texas teaching license because he had at the time of the hearing failed to find employment that paid at least $72,000 annually. The trial court found that Father's efforts at seeking new employment were insufficient and that Father was a college graduate and had a favorable work history, and as such, should be able to find employment offering sufficient compensation. The trial court did not abuse its discretion by concluding that Father was voluntarily unemployed or underemployed and imputing income to him in the amount of $50,000 annually.

The judgment of the trial court is affirmed.

BARNES, J., and CRONE, J., concur.

[5] At the December 3, 2007 hearing, the trial court noted its dissatisfaction with Father's attempts to find adequate employment since relocating to Houston.